admitted hearsay and incompetent evidence was harmless, is in conflict with the rule applicable to the admission of erroneous evidence in criminal cases announced by the Supreme Court of New Mexico in State vs. Chesher, 22 N. M. 319, 161 Pac. 1108.

III.

The Court's opinion in holding the admitted hearsay and otherwise incompetent evidence harmless, in view of the fact it was the only evidence submitted by the Government as to certain stocks upon said issues of value, presents to this Court an outstanding example of unfairness in trial procedure, and a clear abuse of fair judicial practice and process so as to call for an exercise of this Court's power of supervision.

WHEREFORE, Petitioner prays that this Court grant the Writ of Certiorari herein applied for and to the end that justice may be had that Petitioner be granted a new trial, and for such other and further relief as the ends of justice may require.

JAMES M. HERVEY,
Roswell, New Mexico
CASWELL S. NEAL,
Carlsbad, New Mexico
Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION

for

WRIT OF CERTIORARI

I.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit appears at page 693 in the record, and is reported in ..... Fed. (2d) ..... The dissenting opinion of Judge Phillips appears in the record at page 704.

II.

Statement Of Jurisdictional Grounds

This Court has jurisdiction under Section 347, Title 28, U. S. C. A.

III.

Statement Of The Case

The case is stated in the preceding Petition for the Writ, and said Petition is incorporated by reference herein.

IV.

Specification Of Errors

The learned United States Circuit Court of Appeals for the Tenth Circuit erred in failing to reverse the Trial Court (United States District Court for the District of New Mexico) on the following assigned error:

> "The Court erred in admitting over defendant's objection, in connection with the testimony of the witness Fisher, evidence for the purpose of showing the market value of certain securities, consisting of evidence purely hearsay in character, improper and incompetent, for the purpose of establishing market value and in refusing to withdraw such evidence from the jury, all to defendant's prejudice."

V

Argument And Authorities

It is respectfully urged that the Circuit Court was in error in holding the testimony of the witness Fisher was harmless. It was charged in the Indictment that as a part of the alleged scheme to defraud, the Petitioner falsely represented th value of certain insurance stock owned by Old Lin Insurance Shares Corporation, and that these stocks were carried on the books of the company and in printed statements and otherwise at far in excess of their true value, and that such values were false and known by the Petitioner to be false.

The market value of these stocks was a highly controversial issue in the case. For the purpose of attempting to prove the value of these stocks (which were stocks not listed or quoted on any stock exchange), the Court permitted the Government witness Charles E. Fisher to testify that he was manager of National Quotations Bureau engaged in making reports and records of prices of unlisted securities. The

testimony was purely hearsay in character, being nothing more than offers to buy, or offers to sell, unaccompanied by any other facts or circumstances to render the evidence competent and wholly unaccompanied by evidence of actual sales resulting therefrom.

The testimony of this witness appears in the original Transcript of Record at pages 106-116. The testimony was clearly incompetent.

Sharp vs. United States, 191 U. S. 341, 24 Supt. Ct. Rep. 114, 48 L. Ed. 211.

Clarke vs. Hot Springs Electric Light & Power Company, (10th) 55 Fed. (2d) 612.

Wiget vs. Becker, (8th) 84 Fed. (2d) 706.

The Circuit Court conceded the evidence was improper and said:

> "It may be conceded, as a general proposition, that a mere quotation of offers to buy or sell is not a proper criterion of value unless it is also shown that sale results therefrom, or unless the quotation results in a sale in the regular course of business. (Citing authorities). It may be conceded that the isolated quotations of bids by brokers to buy or sell the stock of the insurance companies involved here are entirely too uncertain, shadowy, and speculative, to form any sound foundation for the determination of value."

A majority of the Court arrived at the following conclusions in holding the evidence was harmless error:

> "If this were the only testimony tending to show the highly the highly fictitious value of the assets of the Company, as represented by the defendant in his financial report to the investors, we would be constrained to consider more seriously the question of its probative value, but in each instance there is direct evidence of purchases made by the defendant of the stock in question and the prices he paid therefor. His testimony shows that he was familiar with the stock and its value. This is of course irrefutable evidence, not only of the value of the stock, but the value which the defendant himself placed upon it. The record shows a wide and unexplained variance between the price defendant paid for the stock of the various insurance companies, and the price which he placed upon it when transferred to the books of the company as an asset.
>
> "These transactions, within themselves, amply support the allegations in the indictment concerning the false and fictitious value of the assets of the company as represented by the defendant. The testimony complained

of, although of doubtful value, is not prejudicial when considered in connection with the defendant's transactions involving the purchase and sale of the stock in question."

The record of the case did not support these conclusions, for that:

(a) It is not true that in each instance relating to the stock in question there is direct evidence of purchases by the Petitioner, and the price he paid for it.

(b) It is not true under the circumstances appearing from the record that the price paid by the Petitioner for any stock constitutes "irrefutable evidence" of its value, the record conclusively showing that stocks were only purchased by the Petitioner when he could get them at a bargain, and at less than their value.

(c) It is not true that the variance between the price paid for the stock and the price Petitioner placed upon it is not explained.

(d) It definitely appears from the record that as to some of the stocks, testimony of the witness Fisher was the only evidence offered by the Government in support of its value as to such stocks.

On the other hand, it is asserted by Petitioner:

(a) As to some of the stock the evidence of the witness Fisher was the only evidence relied upon by the Government to prove value.

(b) That the issues of value were so important a controversy between the Government and the Petitioner, that the admission of incompetent evidence to sustain value cannot be deemed to be harmless.

(c) That the purchase by Petitioner of stock at bargain prices cannot be held by this Court to be "irrefutable evidence" of value, or be deemed conclusively to be "the value Petitioner himself placed upon it."

It is necessary to review the record completely as to the value of each stock testified to by Fisher to enable the Court to ascertain that the evidence of Fisher to enable the Court

to ascertain that the evidence of Fisher cannot be said to be harmless.

Gibraltar Colorado Life

Fisher testified (Tr. 107-109) that J. B. Henri and Company on April 22, 1939, bid $15.00 for ten shares. That on March 30, 1940, E. M. Scanlin and Company bid $20.00 for twenty shares and offered $20.00 for twenty-five shares.

The record shows the Petitioner purchased various shares of this stock at from $25.00 to $40.00 per share (Tr. 127) (Government Exhibit 112, Tr. 400).

The record shows that this stock was carried on the books of the company at $125.00.

The record shows it was stipulated by Petitioner and the Government that no treasury stock of this company was sold by the company for less than $250.00 per share. (Tr. 123).

The Petitioner testified that every share of stock which was set up on the books of the company was set up at the fair value of the stock. (Tr. 162).

That it was set up on the books of the Old Line company at $125.00. That it was sold by the insurance company at $250.00 a share. That it had grown and increased since that time. That he had sold a great many shares for $250.00 a share. That he had never sold but one share for less than $250.00 a share and that was sold for $200.00 a share. That he had a letter from the vice-president of the company (Defendant's Exhibit 64) supporting the value placed upon the stock. (Tr. 162).

The Petitioner further testified with reference to purchases of this and all other stock by him that in order to finance the company he found a way to buy stocks at a bargain and set them up at their reasonable value. That this was authorized by the contract, and that its provisions were explained to the stockholders. (Tr. 143-144). He testified with reference to all stocks (Tr. 152):

> "We could buy these stocks at a bargain. I knew they were worth a lot more money than I could buy them in isolated cases, and that they had an asset value and potential value much greater than the price paid or then

they were set up on the books at."

He testified further (Tr. 158).

> "I was forced to look around for bargains, and I bought certain stocks that I knew was worth what we set them up on our books at and more, and upon fishing around to find bargains, I used some of this money to buy those bargains, and turned them over to the corporation, set set them up on the books of the company at the reasonable value, at less than they are actually worth, much lower I mean than they can be eventually sold for."

Bankers Union Life

Fisher testified with reference to this (Tr. 109), Bankers Union Life of Denver on September 8, 1939, Pelz, and Company, New York, shows an interest in Bankers Union Life. They put no market value on it. The testimony shows (Tr. 163) it was carried on the books at $30.00. This was the reasonable value of the stock. On January 2, Dagg and Company, Seattle, were bidding $9.00 for fifty shares, offered twenty shares at $12.00. It has a large organization in six states, $8,000,000 of insurance on the books, $1,000,000 in assets and substantial capital and surplus. It is now paying 57% dividend a share and is easily worth $39.00 a share book value not counting premium value (Tr. 163).

Great American Life Underwriters

Fisher testified on June 3, 1933, E. M. Scanlin in Denver bid $7.50 for fifty shares; showed no offer and on August 4, 1939, Pittman and Company, San Antonio, Texas, bid $7.50 and invited offers on this stock, but no offers were made. That on August 9, 1939, Steelman and Birkins bid $7.00 and made no offer of sale. On October 7, 1939, .W .K. Archer and Company bid $7.50 for one hundred shares but made no offers of sale; on October 9, 1939, John J. O'Kane and Company bid $7.50 for one hundred shares but made no offers. Other quotations ranged from $6.00 to $8.50 a share. (Tr. 112). This stock was carried on the books of the company at $20.00 a share. (Tr. 163) $20.00 a share was the reasonable value of the stock, and by taking into account the capital and surplus of the Company, and the value of the insurance, it is worth much more than that. (Tr. 163).

It will be observed that as to this stock the only evidence

introduced by the Government was Fisher's evidence.

Santa Fe National Life Insurance Company

Fisher testified on June 6, 1939, Remer, Mitchell and Reitzel, Inc., Chicago bid 35c for five hundred shares. That on May 9, 1939, Steelman and Birkins, New York, bid 55c but made no offers. This testimony was the only evidence the Government introduced to prove the market value of this stock. The defendant testified that Santa Fe National was carried on the books of the company at $2.00 a share. That this is considerably less than it is worth. That he had sold thirty or forty shares at $7.50 to $10.00 a share. That at the close of business December 31, 1940, it had a capital and surplus of $131,040; insurance in force of $8,519.231. A capital and surplus of $344,000, which divided by the number of shares outstanding would make the stock worth $3.44 a share which was carried on the books at $2.00. (Tr. 163).

J. S. Sherritt, President of Santa Fe National testified that $2.00 at which it was carried on the books of the Old Line company was a fair value for the stock. That using the basis of its surplus and capital and business in force, it is worth $2.25 a share, and that it has been traded for all the way from 75c to $10.00 a share. (Tr. 174). It will therefore be observed as to this stock that the only evidence which in any way tended to substantiate the Government's claim that this stock was carried on the books of the company at less than its value was the incompetent evidence of Fisher.

Amalgamated Securities Corporation

Fisher testified no market was shown on this stock (Tr. 111).

Defendant testified it was carried on the books of the company at $1.00 a share, and was worth in the neighborhood of $5.00 a share. (Tr. 163). The President of the company testified that the $1.00 per share which this stock was carried at upon the books of the company was a fair valuation for the stock. (Tr. 173).

The Court was certainly in error in refusing to strike the testimony of Fisher: "We show no markets at all on Amal-

gamated Securities Corporation." (Tr. 111).

Occidental Life Of North Carolina

Fisher testified that on April 8, 1939, J. B. Henri and Company of Denver showed an interest in 100 shares of Occidental but did not quote a price. L. C. Bennett, receiver of the First Savings Bank and Trust Company of Albuquerque testified he sold 3933 shares of this stock to Pandolfo in May, 1938, at $1.62½ a share. The stock has a par value of $1.00 a share and pays a 7% annual dividend. (Tr. 118-119).

James Monroe testified that on October 12, 1939, he sold Pandolfo 1250 shares for $1750 and made a profit on the transaction.

C. E. Hyer, testified that he was secretary of the company; that the company paid annual dividends of 6% since 1937 but this did not necessarily reflect the earnings of the company; that he would hate to place a value on the stock or go on record as to its value. (Tr. 124). That he knew of a sale of 47,851 shares completed about three weeks before the trial by a company in the course of liquidation at $1.85 per share. (Tr. 124-125-126). This constituted the evidence of the Government upon this question. The Petitioner testified that 1420 shares of Occidental was carried on the books of the company at $4.00 a share. That he had dealt in this stock a number of years. (Tr. 163) That he had sold it from $8.00 to $10.00 per share. Defendant's Exhibit 65 shows many contracts of actual sales ranging from $8.00 to $10.00 a share. The reasonable value of it based upon capital and surplus and the amount of insurance in effect is $7.90 a share. (Tr. 164). The stock purchased by him was purchased because he got it at bargain prices.

The witness Fisher was permitted to testify that he received no quotation on Capital Guarantee Corporation preferred stock (Tr. 112). That he shows no market on National Mutual Savings and Loan Association (Tr. 113). That he shows no market for Western Underwriters Corporation.

Republic National Life Insurance Company

That on April 5, Rauscher Pierce and Company, Dallas,

bid $13.00 for one hundred shares; made no offers. This was carried on the books of the company at $25.00 a share. (Tr. 164) Petitioner testified by taking into consideration the capital and surplus, it is worth $41.00 a share. The company had a capital and surplus of $430,000 with $33,000,000 insurance in force, and $41.00 represents the reasonable value of the stock. (Tr. 164) Prager Miller, a large investor in the company and president of Western Underwriters testified the sum of $25.00 at which this was carried on the books of the company was the fair value of the stock. (Tr. 173). Mr. Miller further testified that the stock of the Western Underwriters Corporation which was carried upon the books of the company at $2.50 a share was the fair value for this stock; that Mr. Pandolfo asked him what the value was and I told him around $2.50 a share. (Tr. 173).

Old Line Life Insurance Company

Fisher testified that on January 27, 1940, Loewi and Company bid $11.50 and offered the stock at $12.25. That on February 10, 1940, David A. Noyes and Company bid 11-5/8 for 100 shares. On March 6, 1940, Caswell and Company bid $11.50 and offered stock for $12.50. Other similar bids are shown by his testimony. (Tr. 113-114). The testimony of this witness was the only testimony introduced by the Government relating to the value of this stock. No purchases are shown. The Petitioner testified it was carried on the books of the company at $25.00 a share; that it would be cheap at $40.00; that it has a capital and surplus of $2,180,000, and $82,607,855 worth of insurance in force, all non-participating and very profitable; that it has a fine dividend record, and has paid substantial dividends throughout its existence. (Tr. 164).

From the foregoing review of the evidence which constitutes the entire record upon the value of the various stocks, it will be observed:

(a) That the incompetent testimony of Fisher was the only evidence introduced by the Government to prove the value of certain of the stocks.

(b) That the purchases made by the Petitioner of various stocks, considering the circumstances under which these purchases were made at bargain prices, and at less than the value of the stock, cannot be said to be "irrefutable evidence" of value or conclusive as to the value of the stock placed upon it by the Petitioner.

In view of the highly controversial issue as to the value of these stocks; in view of the fact that the incompetent evidence of Fisher was the only evidence of the Government as to the value of certain of these stocks; in view of the fact that the purchases made by the Petitioner, considering the circumstances under which they were made, are not purchases which can be said conclusively to establish market value for stock, we cannot believe the Circuit Court was correct in its assertion that the testimony of this witness was harmless.

> Coulston vs. United States (10th) 51 Fed. (2d) 178.
> Miller vs. Oklahoma (8th) 149 Fed. 330.
> Delaney vs. United States, 263 U. S. 586, 44 Sup. Ct. Rep. 206.

In the later case the Supreme Court said:

> "It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. Hearsay evidence can have that effect, and its admission against objection constitute error. Diaz vs. United States. 223 U. S. 442, 450, 56 L. Ed. 500, 503, 32 Sup. Ct. Rep. 250."

We are aware of the fact that some Courts hold that the burden is upon the Petitioner to show that there was not only error in admitting the evidence complained of, but also prejudice It is urged that in this case that burden has been shown. The incompetent evidence was admitted over Petitioner's objection. The jury, from the Court's ruling, admitting it, had the right to assume it was competent evidence to be considered by them. The issue of value was highly controversial, and the Government's only testimony as to some instances of value was the incompetent testimony of the witness Fisher. In view of the Petitioner's explanation of the value placed upon the stock by him, and the explana-

tion given by him in connection with the purchases made by him, how can this Court say that the jury excluded from its consideration all of the incompetent evidence which the Court admitted over the Petitioner's protest and which he refused to strike on Motion? We can not believe justice can be truly administered by a fair trial before a jury when the jury is permitted to consider incompetent evidence or where an appellate Court follows the rule that incompetent evidence is not harmful where the issues upon which it was admitted in a criminal case are tightly drawn.

We feel that the opinion of Judge Phillips was eminently correct when he dissented using the following language:

> "It is my opinion that the testimony of the witness Fisher was incompetent and that we cannot say on this record that it was not prejudicial. See Coulson vs. United States, 10 Cir., 51 F. 2d 178, 182. It is my conclusion, therefore, that the petition for rehearing should be granted, and that the judgment should be reversed with instructions to grant the appellant a new trial."

We respectfully urge that if the jury considered this evidence in arriving at its verdict of guilty, the evidence was certainly not harmless. This Court has no way to determine what happened in the jury room. This Court was not there. This Court should indulge in the presumption in favor of the liberty of the citizen. The liberty of a citizen, the maintenance of justice in the trial of criminal cases, and the constitutional guaranty of a fair trial by jury cannot be adequately maintained if an appellate Court assumes the role of a jury and attempts from the record to separate the wheat from the chaff, and say that the jury only considered the wheat, and excluded the chaff.

We do not feel that an appellate Court should become triers of fact and say what evidence the jury believed and what it disbelieved. On the other hand, we feel that the Court should presume as a matter of law, that all evidence which the Court admitted for the jury's consideration was proper to be considered and was considered by them. How can this Court say that the incompetent evidence was not a determining factor or the deciding feature which caused the

jury to conclude the issue against the Petitioner?

In New Mexico it is the substantive law in criminal cases announced by the Supreme Court of New Mexico in the case of State vs. Chesher, 22 N. M. 319, 161 Pac. 1108, that the doctrine of harmless error in criminal cases is a dangerous one and will not be applied where the Court is unable to state as a fact that the incompetent evidence had no bearing upon the conclusion reached by the jury. In that case the Court said:

> "The doctrine of harmless error in criminal cases is a dangerous one, and will not be applied in this case, for we are wholly unable to state as a fact that this evidence would have had no material bearing on the conclusion reached by the jury."

VI.

CONCLUSION

Petitioner therefore earnestly requests a consideration of the matters shown by the record and the error complained of, and, in order that justice be done, and that Petitioner have the fair and impartial trial guaranteed by the Constitution, that this Honorable Court hold that the incompetent, inadmissable and hearsay evidence of the witness Fisher was prejudicial and that Petitioner did not receive a fair and impartial trial and grant the relief prayed for.

Respectfully submitted,

J. M. HERVEY,
Roswell, New Mexico.
CASWELL S. NEAL,
Carlsbad, New Mexico
Counsel for Petitioner